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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

RICHARD DeSCISCIO, JOHN DERRICO
and FRANK DANIELLO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Government, consistent with a criminal defendant's right to access to evidence and right to present a defense, has a qualified privilege to withhold technical data sought by the defendant to challenge the integrity of electronic surveillance evidence?

2. If the Government has such a privilege, what showing is required to overcome it?

3. Did Petitioners overcome any such privilege where an audio engineering expert, who identified specific and unusual technical irregularities on the tape recordings as signs of possible tampering, needed certain technical data to determine whether tampering had in fact occurred, and where the Government submitted a declaration of an FBI agent asserting the confidentiality of the requested information, but not disputing the existence or significance of the irregularities?

PARTIES TO THE PROCEEDING

In addition to the named parties, Louis Anthony Manna, Martin Anthony Casella and Rocco J. Napoli were parties in the courts below.

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Petitioners pray for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The court of appeals affirmed the district court's judgments, without opinion, in judgment orders reported at 919 F.2d 733. Petitioners' judgment orders are reprinted in the Appendix at App. 1a *et seq.* The district court's

order denying a motion to compel disclosure of technical electronic surveillance data is unreported and is reprinted at App. 4. The district court's order denying a motion for reconsideration, given orally and transcribed, is reprinted at App. 5.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty or property, without due process of law. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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[1] A petition for a writ of certiorari filed on February 15, 1991, by co-defendant Louis Anthony Manna (No. 90-1364) indicated that Petitioners herein joined in that petition pursuant to Rule 12.2. The instant petition, based on the identical facts and raising the identical questions, is being filed following notification from the Court, received March 7, 1991, that the notice in the earlier petition was inadequate to join Petitioners in it.

STATEMENT OF THE CASE

1. Petitioners were indicted in the District of New Jersey for federal racketeering offenses. The evidence consisted principally of tape recordings of conversations intercepted by FBI agents pursuant to court orders.

2. Co-defendant Louis Anthony Manna moved prior to trial to compel production of technical information relating to the electronic surveillance. Among the information sought were the exact locations of the microphones installed in the dining room of a restaurant, Casella's, where conversations were intercepted; an exact description of each microphone and its operating frequency; whether a "SAMR unit" was in place at the location; and the last time the record head azimuth and frequency response was calibrated. The Government declined to provide this information on the grounds that it "is irrelevant to authentication and also constitutes privileged technical information, the disclosure of which will reveal investigative techniques and frustrate future investigations." The district court denied Manna's motion, finding that "for the reasons expressed by the United States any further disclosure is both inappropriate and unwarranted." (App. 4)

Manna immediately filed a motion for reconsideration, supported by the affidavit of Thomas Owen, who had been retained by Manna's counsel to assist in voice identification and authentication of the taped conversations. Owen stated that he was on the Certification Board of the International Association for Identification and had provided voice identification and authentication services in at least 50 federal criminal prosecutions. He was a member of the Audio Engineering Society, the Acoustical Society of America, the Association for Recorded Sound Collections and the International

Association for Identification. He designed signal processing devices and was the author of "Forensic Audio and Video – Theory and Applications," a monograph presented at the 83rd Convention of the Audio Engineering Society in 1987, which discussed the need for forensic examiners of surveillance tapes to address such issues as tape enhancement, signal processing, voice identification, editing or tampering, and physical degradation.

Owen stated that it was at his request that disclosure of particular information had been sought from the United States. His examination of the tapes disclosed evidence of acoustical environment and background noises changing at various times and inexplicable abrupt changes in conversations. In order for him to simulate a "rebroadcasting" from Casella's Restaurant, for which he had already recorded the defendants' voices, it was imperative for him to know whether simultaneous multi-mics were in place and whether or not they had been fed into a single channel mixer. In order to identify noise bands noticed in spectrograms and their origin he needed to know the relative distances of speaker to microphones, sound pressure levels, distances between speakers, and placement of speakers. Because there was spectrographic evidence indicating noise band interference at certain frequencies, Owen stated that he was also in need of an exact description of microphones, to determine operating frequencies, as well as the distance of microphones from the receiver.

As to the SAMR unit, Owen stated that the Government uses an electronic box that switches the recorder on and off in a manner that adds confusion to the authentication analysis. The information regarding the calibration of the record head azimuth and frequency response,

Owen stated, was essential to determine whether conversations proceeded at the right speed and tracking, which affects voice identification and authentication.

3. This motion for reconsideration was denied, but the district court permitted Manna to renew the application at trial. The court inquired of Manna's counsel – aside from the privilege issue – what was the relevancy of type and location of the equipment. Counsel replied that the location of the microphones and the type of equipment was needed to support the argument that the equipment was unable to transmit sound sufficient in quality to provide acceptable voice identification. In addition, because certain kinds of equipment facilitate tampering with tapes in a way that is otherwise undetectable, the type of equipment used was necessary to determine if the tapes were authentic and untampered with. The defense expert, Owen, could not establish whether the tapes had been tampered with unless he knew what type of equipment was used. Counsel for co-defendant Martin Cassella added that the location of the microphones and the type of equipment used would enable the expert to give an opinion as to whether a taped comment by someone was part of one conversation in the restaurant or another conversation. Counsel for Manna offered to produce Owen to explain the technological basis for the defense request.

The court directed that the parties submit briefs regarding the Government's claim that the information was privileged. Manna subsequently produced Owen and submitted a letter brief addressing the issues of relevance and privilege. The Government simultaneously submitted

a brief on the privilege issue alone. Manna's brief reiterated that there was evidence of spectrographic differences denoting radio frequency problems – instances of interference within conversations – and that it was possible intentionally to induce such interference, either contemporaneously or subsequently, as a means of distorting specific conversations. Moreover, defense interviews of certain participants in particular conversations indicated discrepancies as to speaker location as evidenced on the government tapes and transcripts, that is, that the tapes appeared to be a compilation of distinct and separate conversations. Disclosure of microphone placement was essential to corroborate speaker misidentifications.

Manna's submission stated that there were signal anomalies on the tapes – limited frequency response, poor signal to noise ratio, transmission problems, absence of low frequencies, and absence of "S" sounds – which should not be present since the microphones were powered by alternating current and since the Government routinely utilizes equipment which transmits over great distances with clarity. This indicated that the Government either utilized substandard equipment or induced anomalies into the tapes in order to obscure speaker identification and conversation content. To pinpoint the cause of these anomalies, descriptions of the microphones were required.

Manna's letter brief also stated that it is not possible to ascertain tampering without disclosure of the use of a SAMR unit, because that equipment tends to mask indications – developable magnetic marks – that recording equipment has been manually operated. Detection of

tampering where a SAMR unit has been used requires, instead of developing fluid, examination by oscilloscope.

The Government's letter brief asserted that the disclosure of the requested information would seriously frustrate future electronic surveillances and undermine the effectiveness of the technique. Appended to the Government's brief was the declaration of Bernard J. Murphy, Assistant Special Agent in Charge of the Newark Office of the FBI. Murphy declared that the information sought was closely guarded by the FBI and "[t]o provide the defendants with technical information relating to electronic surveillance equipment, the manufacturing specifications, placement and other items would allow them to devise means to intercept, detect and defeat the use of electronic surveillance equipment by law enforcement." Murphy added that "[s]uch discovery could also lead to the death of covert law enforcement operatives" and "could adversely impact national security."

The Government's submission did not contest Manna's claims as to the technological bases for his request, nor did the Government offer any expert proof, either by affidavit or testimony, refuting Manna's claims. Analogizing to the "informant's privilege" recognized in *Roviaro v. United States*, 353 U.S. 53 (1957), the Government asserted that such information should not be disclosed absent "a particularized and compelling need" by the defense.

4. Manna persisted in his efforts to convince the court that Owen be permitted to testify in order to explain more competently than counsel the need for the information. The court – after stating initially that it

didn't need any testimony, it wanted to hear some relevance – ultimately acceded to the request and afforded the defense fifteen minutes to elicit testimony from Owen.

Owen testified that, although he was an expert on voice identification, in this case he was unable to conduct a spectrographic analysis of speech patterns and voice identification because the tapes were in most instances of such poor quality that the criteria for a determination could not be met. Owen elaborated on the reasons contained in Manna's submission why he needed to know the location and descriptions of the microphones and whether a SAMR unit had been used in order to authenticate the tapes. He explained that, where a SAMR unit is used, the recorders are turned on and off by this unit, not by an agent manually hitting play and record controls. When those controls operate, as opposed to a SAMR unit, magnetic tracks or electrical signatures are left on the tapes. The signatures can help determine whether the tape was tampered with by starting and stopping. Here there were electrical signatures from the starts and stops, but not in the manner he was used to seeing.

As to the exact locations of the microphones, Owen testified that there seemed to be instances of multiple conversations on the tapes picked up from the kitchen, the dining room and in one instance the exterior of the restaurant, and the Government's disclosure that there was only one microphone in the dining room was not consistent with his experience or his examination of the tapes. Owen was not aware of any microphone that had such range, and wanted to do acoustical testing inside the restaurant to determine if it was possible. Owen had also taken voice exemplars of Manna and other defendants,

and needed the technical information to simulate the broadcast. Having heard a toilet flush on one occasion, he was also concerned that multiple microphones, including one in the ladies room, were feeding into the same tape. Owen stated that the tapes in this case were the worst quality he had ever heard[2] and, given the high technical ability of the FBI, he could not think of a valid reason why they should sound that way, unless there was more than one microphone, the input is being mixed, and that the recorder is being turned on and off by some special unit.

The prosecutor's cross-examination of Owen focused on largely peripheral or collateral matters, such as what disclosure Owen had obtained from the Government in other cases or why Owen had not read the electronic surveillance applications and affidavits in this case, or on minute matters relating to the recordings here, but Owen never wavered from his position that without the requested technical information he was unable to challenge effectively the integrity of the tapes and the reliability of the voice identifications.

5. On the morning following Owen's testimony, the district court adhered to its earlier rulings that no need for the information or relevance had been shown. Characterizing Owen as a "supposed expert," the court stated:

> Defendant again raises this motion, and has been most insistent that I hear the testimony of Mr. Owen, who, I was told, would convince me of what I had not thus far been convinced.

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[2] The district judge agreed that these were the worst tapes she had heard as well.

> Mr. Owen testified and has convinced me, but of only one thing. That my earlier rulings were eminently correct.
>
> Initially, I remain persuaded that what defendant seeks are, as the Government describes them, "sensitive investigative techniques." Discovery of which, among other things, will frustrate future electronic surveillance and jeopardize the security of ongoing investigations. Information which has never been disclosed.
>
> I also remain persuaded that the information defendant seeks is protected by a common law qualified governmental privilege, a conclusion well supported by the affidavit of Bernard J. Murphy, Assistant Special Agent in charge of the Newark Office of the FBI. Defendant does not suggest to the contrary, arguing only that this qualified privilege has been overcome by defendant's legitimate defense needs.
>
> I disagree. (App. 7-8)

The court went on to disparage Owen's testimony:

> But even the issue of privilege aside, defendant has utterly failed to put any meat on these conclusory bare bones. Indeed, to characterize what Owen provided in his testimony as even paltry would be to give it a credibility it does not deserve. Even if Owen made any points on direct examination, and I make no such finding, the death rattle surely set in on direct, on cross he was utterly destroyed.
>
> I do not yet have a copy of yesterday's transcript and, therefore, will not detail the many ways in which his testimony failed. It bears mention, however, that even on direct his testimony was at odds with what he stated in his affidavit when he testified that he had no

> personal knowledge of any federal case in which the information sought here was disclosed. It was his representation to the contrary in his affidavit that in large part brought us to the hearing that was held. (App. 8)

The court concluded:

> Stated succinctly, Owen would like to go on a fishing expedition. He has never been on one before, and doesn't really know why he wants to go or what he will do with the big fish, if and when he catches it. Defendant's application for the third and for the last time is denied. (App. 8-9)

6. On appeal from the ensuing judgment of conviction, Manna asserted that the district court had erred in denying his motion to compel disclosure of the technical information. Manna contended that the information was necessary to challenge the integrity of the tapes and the reliability of the voice identifications and that there was absolutely no record support for the district court's ruling and extravagant comments. The Government responded that the district court had properly recognized the Government's qualified privilege to disclose sensitive surveillance information and properly concluded that Manna failed to establish a need to receive it. The court of appeals affirmed without opinion. (App. 1a ff.)

REASONS FOR GRANTING THE WRIT

In today's world of digital communications, where electronic surveillance has become not only commonplace,[3] but extraordinarily sophisticated,[4] control of the technology can mean control of the result. To grant a government sole access to pertinent technical data is to deny the means of uncovering abuse.

This Court has never addressed the question whether the Government has a privilege to withhold technical data from a defendant challenging the integrity of electronic surveillance evidence. The two circuit courts of appeals which have recognized a "qualified privilege" as to such data – analogizing to the "informer's privilege" – have not been sensitive to the unique nature of electronic surveillance evidence and have not adequately defined the showing required to overcome the "qualified privilege." Indeed, in erecting what may be an insurmountable hurdle for defendants to clear, the courts of appeals may have created a *de facto* absolute privilege. This Court, therefore, should grant certiorari to address these increasingly important questions.

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[3] In the last year for which figures are available, there were 763 electronic surveillance authorizations, 310 of them federal. Source: Administrative Office of the U.S. Courts, Summary of Interceptions of Wire, Oral, or Electronic Communications – January 1, 1989 through December 31, 1989. The number of consensual interceptions not requiring court authorization is beyond ascertainment.

[4] *See* G. Marx, *Undercover: Police Surveillance in America* 206-33 (1988).

1. Under the Due Process Clause, criminal defendants must be afforded "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). To safeguard that right this Court has recognized the principle of "constitutionally guaranteed access to evidence." *Id.*, *quoting United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). The Court has also made clear, however, that right to access to evidence is not absolute. Thus, for example, in *Roviaro v. United States*, 353 U.S. 53, the Court recognized the Government's limited privilege to withhold the identity of informers.

Two circuit courts of appeals have extended the limited privilege recognized in *Roviaro* to the nature and location of electronic surveillance equipment.[5] *See United States v. Angiulo*, 847 F.2d 956, 981-82 (1st Cir. 1988); *United States v. Cintolo*, 818 F.2d 980, 1001-03 (1st Cir.

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[5] In Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), a comprehensive legislative scheme governing electronic surveillance, Congress provided for no such privilege. In analogous statutes Congress *has* expressly accommodated similar concerns. For example, in the Foreign Intelligence Surveillance Act, Congress provided that, when the Attorney General files a sworn affidavit stating that disclosure at an adversarial hearing would compromise the national security of the United States, a review of FISA wiretaps must be conducted *in camera* and *ex parte*. 50 U.S.C. § 1806(f). Likewise, in the Classified Information and Procedures Act, Congress provided that the Government, upon a sufficient showing, may delete specified items of classified

(Continued on following page)

1987); *United States v. Van Horn*. 789 F.2d 1492, 1507-08 (11th Cir. 1986).[6]

In *Angiulo* and *Cintolo*, which were related appeals following severed trials of codefendants based on the same electronic surveillance evidence, the appellants asserted that the district court had erred during their trials in barring questions about the precise location of microphones hidden in an apartment. No pretrial motion for that information had been made, nor did the defendants offer any technical basis for the value of the information. The defendants argued solely that they wanted the information to show that persons inside the apartment were not necessarily all involved in the same conversation or able to hear statements made by others in the room. The Government successfully objected to questions about the precise location of the microphones on the

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information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure. 18 U.S.C. Appendix IV § 4. Since Congress provided no similar protection in Title III for electronic surveillance technical information, those courts that have recognized a governmental privilege with regard to such information have arguably usurped Congress' prerogatives. The informer's privilege recognized in *Roviaro* is distinguishable because there Congress had not already spoken on the issue of informers in a comprehensive legislative scheme.

[6] In *United States v. Grier*, 866 F.2d 908 (7th Cir. 1989), holding that the district court's denial of a motion to compel production of materials relevant to the operation of a pen register device did not violate the defendant's rights under the confrontation clause of the Sixth Amendment or Federal Rule of Criminal Procedure 16, the Seventh Circuit did not address the question whether such information was privileged.

ground that it would reveal sensitive surveillance techniques and jeopardize future criminal investigations.

In upholding the district court, the First Circuit, citing *Van Horn*, 798 F.2d 1492, and *United States v. Harley*, 682 F.2d 1018, 1020 (D.C. Cir. 1982),[7] and analogizing to the informer's privilege in *Roviaro*, held that a qualified privilege against compelled government disclosure of sensitive investigative techniques does exist. *Cintolo*, 818 F.2d at 1002. That privilege can be overcome, however, by a sufficient showing of need. *Id.* The defendant must show that "he needs the evidence to conduct his defense *and* that there are no adequate independent means of getting at the same point." *Id., citing Harley* (emphasis added). The *Cintolo* court stressed that the extent to which adequate alternative means could have substituted for the proffered testimony is "a key to evaluating this claim of necessity." *Id.* at 1003.

Both the *Cintolo* and *Angiulo* courts held that the defendants had not made a sufficient showing of necessity because adequate alternate means existed in each case. In *Cintolo*, the jury heard evidence of the size of the apartment, from which it could have concluded that not everyone present could hear every conversation, and the Government's electronic expert conceded the possibility during cross-examination. *Id.* at 1003. The *Cintolo* court counted against the defendant that "the defense failed to demonstrate an absence of alternative methods of making its point." *Id.* The court added that "no expert vouched

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[7] *Harley* involved the location of police officers observing drug transactions.

for the importance of the desired data"; no claim was made that the premises were unavailable for inspection or that a floor plan had been kept from the defense; and Cintolo, who testified, could have said whether or not he participated in the conversations. *Id.*

In *Van Horn*, the district court would not allow the defense to discover the type and location of a microphone that had been installed in a defendant's office. The defendants contended that the information was necessary to demonstrate that the voices on the tapes could have been distorted, resulting in improper voice identifications, and that the testimony of both the FBI agent responsible for the electronic surveillance and their own expert witness indicated that the location of the microphone could have resulted in distortion. The district court conducted a hearing at which the judge listened to the agent, who was monitored from the defendant's office during the surveillance, and was able to compare the agent's voice and determine that it had been accurately recorded. The Eleventh Circuit, after citing *Roviaro*, concluded that under those circumstances necessity had not been shown. 789 F.2d at 1507-08.

2. Petitioners submit that analogizing disclosure of an informer's identity to disclosure of electronic surveillance technical data is inapt. An informer's identity is by its very nature collateral. The informer plays no role at all in the prosecution's case-in-chief, as demonstrated by the very fact that the prosecution chooses not to reveal the informer's identity. A defendant seeks disclosure of the informer's identity typically for the sole purpose of finding ways to attack the credibility of other witnesses who

do testify. Rarely is disclosure central to the factfinding process.

In prosecutions where the investigation has employed electronic surveillance, on the other hand, the evidence derived from that surveillance typically constitutes the heart of the Government's case-in-chief. Indeed, not infrequently the Government's case consists exclusively of intercepted conversations. Tapes of these conversations can be neither cross-examined nor impeached. If that evidence has been tampered with, therefore, the trial is necessarily a perversion of the factfinding process because the central facts have been distorted.

Consequently, where there are identified signs of possible tampering – and particularly where, as here, the Government does not dispute the presence of those signs – it is crucial to the integrity of the trial that a defendant be given a meaningful opportunity to investigate the integrity of the tapes. In a real sense, withholding from a defendant the only means of effectively challenging the integrity of tape recordings is the same as withholding from him the only means of effectively cross-examining the key prosecution witness.

Moreover, the disclosure of electronic surveillance technical information does not present the same type of immediate hazards that disclosure of an informer's identity might. Disclosure of an informer's identity may put him and/or his family in immediate danger of physical harm. It may also compromise an ongoing investigation or investigations in which that informer is still active. *See generally McCray v. Illinois*, 386 U.S. 300, 307-09 (1967).

Disclosure of electronic surveillance technical information, on the other hand, will rarely if ever present such immediate hazards. Rather, to the extent that such disclosure might expose, and thus compromise, sensitive investigative techniques, it is more akin to the *remote* effects of informer disclosure, like reducing the future usefulness of the informer and discouraging other informers from cooperating with law enforcement.[8] These remote, and necessarily speculative dangers, are not substantial enough to outweigh a defendant's right to meet the prosecution's proof, anymore than the difficulties which a victim faces in testifying at trial, thereby discouraging some future victims from coming forward, would justify permitting victims to submit evidence by affidavit. *See generally Coy v. Iowa*, 108 S.Ct. 2798, 2803 (1988) (rejecting presumption of trauma to victims of sexual abuse that outweighs defendant's right to confrontation).

Finally, in electronic surveillance cases the technical data is exclusively within the ken of the law enforcement entity that conducted the surveillance. The identity of an informer, on the other hand, is not. Most often, a defendant is peculiarly in a position to know those who were privy to his criminal conduct. He can investigate accordingly and is free to subpoena anyone he feels may be useful to his defense.

In electronic surveillance cases, therefore, where as here a defendant makes a fact-based showing supporting

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[8] Here, when declining Manna's request to furnish the information at issue, the Government stated that disclosure "will reveal investigative techniques and frustrate future investigations."

a belief that tampering may well have occurred, he should have a meaningful opportunity to meet the Government's proof by gaining access to the technical information necessary to do so.[9] To hold that such information is privileged and to erect insurmountable barriers to overcoming that privilege is constitutionally intolerable.

3. The circuit courts which have recognized a qualified governmental privilege with respect to certain electronic surveillance information have unconstitutionally erected an impermissibly high threshold showing for defendants who seek to overcome such a privilege. The *Roviaro* Court had stated, with respect to the informer's privilege, that it must give way where disclosure of the information "is relevant and helpful to the accused *or* is essential to a fair determination of the cause." 353 U.S. at 60-61 (emphasis added). Although courts have used the term "need" as shorthand for *Roviaro's* formulation, *see, e.g., United States v. Jiles*, 658 F.2d 194, 196, 197 (3d Cir. 1981), a showing that such information is "relevant and helpful" should satisfy the literal language of *Roviaro*. In

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[9] This does not mean that the information should necessarily be disclosed without any limitation whatsoever. Where confidential information must be disclosed to protect a defendant's rights, the Court has noted that "the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosures." *Alderman v. United States*, 394 U.S. 165, 185 (1969). Here, for example, since the information was sought primarily for the expert's testing, initial disclosure might have been limited to him and possibly defense counsel, with further disclosure contingent on a demonstration that the expert's tests justified such disclosure.

any event, even if "need" must be demonstrated, it is clear that *Roviaro* doesn't require a showing that the information is "essential," since *Roviaro* employed that term in the disjunctive.

Nevertheless, the courts recognizing a qualified governmental privilege with respect to electronic surveillance information, based on *Roviaro,* have not only required a showing of need for the information, but in reality have required that the defendant demonstrate that the information is essential, or at least indispensable, to his defense. This is clear from the First Circuit's requirement that the defendant show "he needs the evidence to conduct his defense *and* that there are no adequate independent means of getting at the same point," *Cintolo,* 818 F.2d at 1002, and from its counting against the defendant that "the defense failed to demonstrate an absence of alternative methods of making its point," *id.* at 1003. That is a quantum leap from *Roviaro's* "relevant and helpful" standard and a substantial leap from a mere showing of "need."[10]

Roviaro indicates that the problem calls for balancing the public interest in protecting the flow of information against the individual's "right to prepare a defense." 353 U.S. at 60-61. In determining whether a proper balance

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[10] Here, the Government incorrectly represented to the district court that in *Roviaro* "the Supreme Court recognized the governmental privilege to withhold the identity of an informant absent *a particular and compelling need* for the information by the defense." What standard the district court applied is not clear from its ruling.

renders non-disclosure erroneous under the circumstances of a particular case, a reviewing court must consider the crime charged; the possible defenses; the possible significance of the information; and other relevant factors. *Id.* at 62.

That criminal defendants must be afforded "a meaningful opportunity to present a complete defense," *California v. Trombetta*, 467 U.S. at 485; that there is a "constitutionally guaranteed access to evidence," *United States v. Valenzuela-Bernal*, 458 U.S. at 867; and that it is not merely a defendant's need but his "right to prepare a defense" that is to be balanced against the public interest in protecting the flow of information, *Roviaro*, 353 U.S. at 61, all point to the substantial, indeed fundamental, rights at stake when the Government withholds information which a defendant seeks in order to mount his defense. To hold that the Government's claim of privilege prevails over these rights, unless the defendant can demonstrate that the information is indispensable and no alternate method of making the argument is available, trivializes those rights and gives inordinate and virtually dispositive weight to the concerns of law enforcement. That is not the balance struck by the Constitution, nor by the Court in *Roviaro*.

4. Manna made a sufficient showing to overcome any government privilege in this case. The district court's finding to the contrary is unsupported by the record, and the court's disparagement of the defense expert was unfounded and unwarranted. Since this argument is more appropriate to a brief on the merits than a petition for certiorari, it is only summarized here.

Manna, while expressly stating that his expert could not establish whether the tapes had been tampered with unless he knew what type of equipment had been used, did provide ample concrete facts to support a belief that tampering may well have occurred, facts more than sufficient to justify further inquiry and warrant disclosure of the requested information. This fact-based showing exposes as unfounded the district court's statements that the expert's representations were "conclusory" and "paltry" or that he wanted to go on a "fishing expedition."

Manna presented the following evidence of possible tampering – by editing, by intentionally inducing interference to distort specific conversations, or by mixing different conversations – based on the expert's examination of the tapes:

- evidence of acoustical environment and background noises changing at various times and inexplicable abrupt changes in conversations.

- evidence that there were spectrographic differences denoting radio frequency problems – instances of interference within conversations – and that it was possible intentionally to induce such interference, either contemporaneously or subsequently, as a means of distorting specific conversations.

- signal anomalies on the tapes – limited frequency response, poor signal to noise ratio, transmission problems, absence of low frequencies, and absence of "S" sounds – which should not be present since the microphones were powered by alternating current and since the Government routinely utilizes

> equipment which transmits over great distances with clarity, indicating that the Government either utilized substandard equipment or induced anomalies into the tapes in order to obscure speaker identification and conversation content.
>
> - electrical signatures on the tapes from the starts and stops, but not in the usual pattern.
>
> - the extremely poor quality of the tapes, for which, given the high technical ability of the FBI, there was no valid reason unless there was more than one microphone, the input was being mixed, and the recorder was being turned on and off by some special unit.

As to the specific request whether a SAMR unit had been used, the expert explained that where a SAMR unit is used the recorders are turned on and off by this unit, not by an agent manually hitting play and record controls. When those controls operate, as opposed to a SAMR unit, magnetic tracks or electrical signatures are left on the tapes. The signatures can help determine whether the tape was tampered with by starting and stopping. Here, according to the expert, there were electrical signatures from the starts and stops, but not in the manner he was used to seeing.

Most unfounded was the district court's suggestion, casting a cloud on the expert's credibility, that there would not even have been a hearing but for a purported misrepresentation in his expert's affidavit. In the affidavit he had stated:

> I have provided voice identification and authentication services in at least 50 federal criminal prosecutions. Several of these cases were situated in New York, Connecticut and

> New Jersey. In almost every case in which I have been involved, the requested information was provided.

On direct examination, the expert stated that in a case in the District of Connecticut he had been retained only as a video expert after "a tremendous amount of technical information was exchanged, including the picture of the SAMR unit and a general description of how it worked." He added that he believed the exact location and description of the microphones were also disclosed. Responding to a question from the court, the expert stated that in "[m]ost of the cases I work on the Government gives up the information about the equipment."

On cross-examination, the expert testified that when he stated the Government had turned over the requested information in most of the cases he has worked on, he was referring to the particular information requested in each case, depending on the circumstances of the case. Thus he had been furnished technical information regarding the recorder, the tape on which the recording was made and acoustical information necessary to the investigation. He had not personally requested the exact location or description of the microphones in previous cases because that information had not been important in those cases, which usually dealt with authentication concerning the tape itself.

For the district court to suggest from this line of inquiry that the expert was "utterly destroyed" is disconcerting to say the least and appears to be an attempt to bolster the court's ruling with an impregnable credibility determination. The court's predisposition to discredit the expert's testimony had already been demonstrated when

the court challenged him twice during direct examination, stating: "You think the Government lied to you?" and "All right. So you say the Government has lied to me?" The expert appropriately answered that it was not for him to say whether the Government lied or not, but as a technical person he would want to get the information, do his own analysis and perhaps conclude that they weren't lying.

Moreover, given the fact that the court was unwilling to let the expert testify at all – stating that it didn't need any testimony, it wanted to hear some relevance – and grudgingly allotted fifteen minutes for his testimony only after counsel's repeated importunings that the expert be permitted to explain more competently than counsel the need for the information, it is astonishing for the court to suggest that the statement in his affidavit about obtaining the requested information in other cases "in large part brought us to the hearing that was held."

5. In sum, the fact-based showing made by Manna here was substantial, was directed toward an identified purpose and was based on qualified expert analysis. It is difficult to imagine a showing less "conclusory," a goal less suited to the term "fishing expedition" and a witness less deserving of the epithet "supposed expert." It is equally difficult to imagine what better showing a defendant would be required to make.

To bar disclosure in a case where, as here, the tapes are the Government's only evidence of guilt, where the tapes are of unusually poor quality, where irregularities in those tapes are discovered and identified by a defense expert and not contested by the Government, and where

the voice identifications are vigorously disputed, solely out of deference to law enforcement interests, makes a mockery of our conceptions about fair trials. If disclosure was not warranted under the uniquely strong and documented circumstances of this case, then disclosure will never be warranted, and calling the Government's privilege a "qualified" one is a contrivance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

Dated: New York, New York
March 13, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5823

UNITED STATES OF AMERICA

v.

RICHARD DESCISCIO,

Appellant

Appeal from the United States District Court
for the District of New Jersey
D.C. Criminal No. 88-00239-03
(Honorable Maryanne Trump Barry)

Argued November 8, 1990

Before: SLOVITER, SCIRICA and SEITZ, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

1. That appellant was denied his constitutional right to be tried upon an indictment returned by a grand jury based upon the improper evidence submitted to the jury by the court;

2. That the prosecutor's personal opinion relating to the appellant's guilt and the credibility of the defense

witnesses from materials extraneous to the court proceedings is per se grounds for reversal;

3. That the government's failure to provide reciprocal discovery of alibi witnesses pursuant to Fed. R. Crim P. 12.1 violated appellant's constitutional rights to due process and a fair trial;

4. That the evidence was insufficient to permit the jury to conclude beyond a reasonable doubt that appellant conspired to murder John or Gene Gotti; and

5. That the alleged errors identified by appellant Louis Anthony Manna, appellant in No. 89-5821, appellant Martin Anthony Casella, appellant in No. 89-5822, appellant Rocco J. Napoli, appellant in No. 89-5824, appellant John Derrico, appellant in No. 89-5825, and appellant Frank Daniello, appellant in No. 89-5826, require reversal of the conviction of appellant Desciscio, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

BY THE COURT,

/s/ _____
Circuit Judge

Attest:

/s/ _____
Sally Mrvos, Clerk

NOV 21 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5825

UNITED STATES OF AMERICA

v.

JOHN G. DERRICO,

Appellant

Appeal from the United States District Court
for the District of New Jersey
D.C. Criminal No. 88-00239-06
(Honorable Maryanne Trump Barry)

Argued November 8, 1990

Before: SLOVITER, SCIRICA and SEITZ, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

1. That appellant was improperly and prejudicially joined for trial with appellants Manna, Casella, Napoli and Desciscio; and

2. That the alleged errors identified by appellant Louis Anthony Manna, appellant in No. 89-5821, appellant Martin Anthony Casella, appellant in No. 89-5822, appellant Richard Desciscio, appellant in No. 89-5823,

appellant Rocco J. Napoli, appellant in No. 89-5824, and appellant Frank Daniello, appellant in No. 89-5826, require reversal of the conviction of appellant Derrico, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

BY THE COURT,

/s/ _____
Circuit Judge

Attest:

/s/ _____
Sally Mrvos, Clerk

NOV 21 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5826

UNITED STATES OF AMERICA

v.

FRANK DANIELLO,

Appellant

Appeal from the United States District Court
for the District of New Jersey
D.C. Criminal No. 88-00239-11
(Honorable Maryanne Trump Barry)

Argued November 8, 1990

Before: SLOVITER, SCIRICA and SEITZ, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

1. That appellant was improperly and prejudicially joined for trial with appellants Manna, Casella, Napoli and Desciscio;

2. That the introduction of the firearms found at appellant's home unfairly prejudiced appellant and were inadmissible under any theory; and

3. That the alleged errors identified by appellant Louis Anthony Manna, appellant in No. 89-5821, appellant Martin Anthony Casella, appellant in No. 89-5822, appellant Richard Desciscio, appellant in No. 89-5823, appellant Rocco J. Napoli, appellant in No. 89-5824, and appellant John Derrico, appellant in No. 89-5825, require reversal of the conviction of appellant Daniello, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ _____
Circuit Judge

Attest:

/s/ _____
Sally Mrvos, Clerk

NOV 21 1990

[ORDER DENYING MOTION]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, vs. LOUIS ANTHONY MANNA, et. al., Defendants	:	Criminal Action ORDER

Defendant Manna having moved to compel the United States to produce technical information relating to the electronic surveillance conducted at Casella'a Restaurant, and the United States having responded thereto and having provided most of the information requested, and the court finding that for the reasons expressed by the United States any further disclosure is both inappropriate and unwarranted,

It is on this 15th day of February, 1989

ORDERED that defendant's motion is denied.

/s/ _____
MARYANNE TRUMP BARRY
U.S.D.J.

[ORAL ORDER DENYING RENEWED MOTION]

* * *

On or about February 1st, 1989, defendant Manna filed a motion to compel the production of technical information relating to electronic surveillance at Casella's Restaurant. Specifically, the motion sought: (1) The exact locations of the microphones installed in Casella's Restaurant;

(2) The exact method of control as to how the microphones were turned on-and-off;

(3) An exact description of each microphone and its operating frequency;

(4) Whether a SAMR unit was in place at the location;

(5) Describe how the agent was able to determine which microphone he or she was listening to;

(6) Who determined which microphone was to be listened to;

(7) Was the tape recorder routinely serviced;

(8) When was the last time the record head, azimuth and frequency response was calibrated;

(9) Were the recorders powered by batteries or alternating current;

(10) Were any test tunes generated on the tape prior to the recording;

And (11) Did the agents clean the tape heads at every session.

By letter dated February 14th, 1989, the United States responded

as follows:

(1) Microphones were installed in three locations at Casella's Restaurant: (a) the Chariot Room; (b) the ladies room adjacent to the Chariot Room; and (c) the outside bench and sidewalk area. More exact locations will not be disclosed.

(2) The microphones were turned on-and-off by a switch.

(3) An exact description of each microphone and its operating frequency will not be disclosed.

(4) Whether a SAMR unit was in place will not be disclosed.

(5) and (6). Each microphone has a separate monitoring agent assigned to it.

(7) The tape recorder was routinely serviced.

(8) Information concerning calibration of the recording head, azimuth and frequency response will not be disclosed.

(9) The recorders were powered by alternating current.

(10) Test tones were not generated on the tape prior to the recording.

And (11), the agents did not clean the tape head at every session.

The Government advised counsel that the information that had declined to disclose is irrelevant to authentication and constitutes privileged technical information, the disclosure of which will reveal investigative techniques and frustrate future investigations.

By order filed February 16th, 1989, I denied defendant Manna's motion finding that disclosure beyond what had already been disclosed was both inappropriate and unwarranted. A motion for reconsideration as to the exact location and description of the microphone and the use of a SAMR unit was subsequently made, supported by the affidavit of Thomas Owen, defendant's supposed expert. No need or relevance for the information was shown and the motion for reconsideration was denied.

Defendant again raises this motion, and has been most insistent that I hear the testimony of Mr. Owen, who, I was told, would convince me of what I had not thus far been convinced.

Mr. Owen has testified and has convinced me, but of only one thing. That my earlier rulings were eminently correct.

Initially, I remain persuaded that what defendant seeks are, as the Government describes them, "sensitive investigative techniques." Discovery of which, among other things, will frustrate future electronic surveillance and jeopardize the security of ongoing investigations. Information which has never before been disclosed.

I also remain persuaded that the information defendant seeks is protected by a common law qualified governmental privilege, a conclusion well supported by the

affidavit of Bernard J. Murphy, Assistant Special Agent in charge of the Newark Office of the FBI. Defendant does not suggest to the contrary, arguing only that this qualified privilege has been overcome by defendant's legitimate defense needs.

I disagree. Certainly counsel for defendant has invoked the magic words and phrases. "The information is a sine qua non to expert evaluation of the authenticity of the tapes the information is necessary to undertake a meaningful investigation into the issues of authentication, speaker identification and audibility; and the information if denied to defendant will violate due process."

But even the issue of privilege aside, defendant has utterly failed to put any meat on these conclusory bare bones. Indeed, to characterize what Owen provided in his testimony as even paltry would be to give it a credibility it does not deserve. Even if Owen made any points on direct examination, and I make no such finding, the death rattle surely set in on direct, on cross he was utterly destroyed.

I do not yet have a copy of yesterday's transcript and, therefore, will not detail the many ways in which his testimony failed. It bears mention, however, that even on direct his testimony was at odds with what he had stated in his affidavit when he testified that he had no personal knowledge of any federal case in which the information sought here was disclosed. It was his representation to the contrary in his affidavit that in large part brought us to the hearing that was held.

Stated succinctly, Owen would like to go on a fishing expedition. He has never been on one before, and doesn't

really know why he wants to go or what he will do with the big fish, if and when he catches it. Defendant's application for the third and for the last time is denied.

* * *